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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 53

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 687.

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.[1]

OPINIONS BELOW.

The opinion of the Court of Appeals of September 18, 1962 (App. of Petition, p. 39), is reported in 308 F. 2d

[1] This brief is in behalf of both respondents, whose cases, as the decision below noted, were consolidated in the District Court

474. The memorandum opinion of the District Court (App. of Petition, p. 19) is reported in 195 F. Supp. 919.

JURISDICTION

Petitioner has sought to invoke this Court's jurisdiction under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Three plaintiffs filed companion common law libel suits in a state court against a foreign corporation and four resident defendants. Two plaintiffs won jury verdicts and state court judgments against all defendants. In the third case the foreign corporation, 335 days after the statutory period had expired, sought to remove the case to a federal district court alleging fraudulent joinder of the resident defendants because there was no reasonable basis for their liability under state law. The corporation's "proof" of fraud was the trial transcript of the first case. During this litigation, on review of that same transcript, the highest state appellate court has affirmed the verdict and judgment against these resident defendants, and a Federal Court of Appeals for the state has held that there is a case of substance against them under state law which could go either way.

In these circumstances, may the third plaintiff be deprived of his right to choose a state forum for a jury trial of his common law libel suit?

2. When a state court plaintiff objects, may a foreign corporation remove a case to a federal district court long

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and in the Court of Appeals because there was a common question of whether the cases should be tried in a state or Federal forum. The brief will relate the facts of the *Parks* case only since they are relevant on this common question of law.

after the statutory 20 day period from the occurrence of events specified in the statute (28 U. S. C., § 1446 (b)) has expired simply because the corporation has alleged fraudulent joinder of resident defendants as the ground for removal? Or, does the uniform, short and mandatory period prescribed by Congress for removal of cases from state to federal courts require remand?

STATUTES INVOLVED.

Statutes referred to in this brief are contained in an Appendix.

STATEMENT.

The sole question which petitioner seeks to bring to this Court for review is an interlocutory one. Should these common law libel cases be tried in a state court, where respondents brought them jointly against petitioner and four state residents; or in a federal district court to which petitioner sought to remove them, 335 days late in the **Parks** case and 287 days late in the **Patterson** case—when, as the Court of Appeals below observed, the 20 day statutory period prescribed by 28 U. S. C. § 1446 (b) "had long since expired" (308 F. 2d 474, 475). The asserted ground for tardy removal was that there was no reasonable basis under state law for liability of the resident defendants; and that accordingly their joinder was fraudulent and no bar to federal diversity jurisdiction.

Respondent Parks, a Montgomery city commissioner, on April 19, 1960 (R. 19), sued petitioner and four residents of Alabama, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, in the Circuit Court of Montgomery County, Alabama, for common law libel growing out of a paid advertisement published in the March 29, 1960, issue of the **New York Times** (R. 14) on which the resident defendants' names appeared as "endorsers." A string correspondent of the Times residing in Alabama and the Secretary of State of Alabama were served (R. 97). The Times received the summons and complaint on April 23, 1960 (R. 97).

Simultaneously, companion cases against the same defendants, arising out of the same publication, were begun in the same court by the other two Montgomery commissioners, Sullivan and James. (These actions are referred to in this brief as "the Sullivan case" and "the James case").

The **Sullivan** case was tried first, and there was a verdict and judgment against all defendants on November 3, 1960. The Supreme Court of Alabama affirmed. 144 So. 2d 25.

The **James** case was tried next and resulted in a verdict and judgment against all defendants on February 1, 1961. This case is still pending in the state trial court on motion for a new trial. A chronology of relevant events in the Alabama courts is contained in Appendix A of this brief.

The "fraud" advanced by the Times' tardy petition for removal filed on April 13, 1961, was that attorneys for Parks would introduce the same evidence against the resident defendants in the state court action which they had previously introduced against them in the **Sullivan** and **James** cases; that this evidence did not constitute reasonable ground under state law for judgment against them; and that the **Sullivan** and **James** cases against the resident defendants had gone to state juries under erroneous charges by the state trial court.

At the hearing on respondents' motion to remand, the evidence of "fraud" introduced by the Times was the state trial transcript in the **Sullivan** case, accompanied by the oral testimony of a Times' attorney that the Parks trial evidence would be the same. After summarily re-examining the evidence which an Alabama court had twice held sufficient to present a jury question under Alabama law, and on which two juries had rendered verdicts against all defendants, the District Court denied remand and held that there was no reasonable basis under Alabama law for joining the resident defendants and that the joinder was accordingly fraudulent. The District Court also held that the 20 day time provision of 28 U. S. C., § 1446 (b), did not apply to cases where fraudulent joinder was asserted as a ground for removal.

Nevertheless, because of doubts about the correctness of his order, the District Judge amended it so as to authorize interlocutory appeal pursuant to 28 U. S. C. 1292 (b)[2] (R. 193-194). Similar doubts unquestionably moved the Court of Appeals below, through Chief Judge Tuttle and Judges Rives and Wisdom, to permit the interlocutory appeal (R. 194-195).

These doubts were well founded. On August 30, 1962, the Supreme Court of Alabama upheld the **Sullivan** charge which the Times had termed "erroneous":

> "We have carefully read the court's entire oral instruction to the jury. It is a fair, accurate and clear expression of the governing legal principles."[3]

Moreover, the Supreme Court of Alabama held that the resident defendants were not entitled to a directed verdict. It commented that there was evidence that the four individual defendants "had all given permission to use their names in furthering the work of" the committee which had placed the advertisement with the Times. (144 So. 2d at 46). And it noted, as additional evidence against them, that "after receiving the letter demanding a retraction of the advertisement they had not replied thereto, nor

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[2] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: . . ."

[3] 144 So. 2d at 44. This part of the charge is set out in Petition, pp. 7-8. The approval is unqualified and in no way undermined by the Court's comment that an attempted objection directed to the charge by one of the attorneys for the resident defendants was "too indefinite to invite our review." (144 So. 2d at 45).

had they contacted any person or group concerning the advertisement or its retraction" (144 So. 2d at 49).

Accordingly, the "error" of Alabama law—said to have been tantamount to bad faith and fraud—turned out to be no "error" at all, but a precisely accurate appraisal of Alabama law. The Supreme Court of Alabama clearly held that there was enough evidence against the resident defendants to go to a jury. And its plain words expressly approved the trial court's instructions as to ratification. The Times' contrary assertions (Petition, p. 15) simply do not square with the facts.

Moreover, the Court of Appeals below also held that there had been no error of Alabama law and that there was a case of "substance" against the resident defendants which "could go either way" (308 F. 2d at 480-481). In short, respondents had brought to the state court a classic situation for jury determination—a right safeguarded by the 7th Amendment of the Constitution of the United States.

Though the Court of Appeals directed its attention to the question of alleged fraudulent joinder, the Court did not approve the holding of the District Court that the 20 day removal requirement (28 U. S. C. § 1446 (b)) did not apply. The Court of Appeals noted that removal had been attempted long after the statutory period had expired (308 F. 2d at 475); and expressly declined to rule "on the question of whether the motions to remove were seasonably filed" (308 F. 2d at 481). The Court recited the facts contained in the chronology (see App. A of this brief), observing:

> "The motions to remove alleged that the fraudulent joinder was known at the conclusion of the trials of the Sullivan and Jaines cases. The District Court accepted the excuse for the long delay thereafter in

fore filing the motions that counsel for The Times thought appellants here might produce some additional evidence and only gradually became aware that they would not, after which realization they moved promptly." (308 F. 2d at 481, n. 3).

This observation, climaxing a recital of chronology, is surely an exercise in the sardonic. On June 25, 1960, 292 days before removal, the Times was aware of the contentions of three of the resident defendants. The **Sullivan** "proof" on which the Times relied for its charge of fraud, concluded on November 3, 1960, 161 days prior to removal. The **James** case ended 72 days before removal. Even on the assumption that the Times' sworn removal petition seriously asserted that it did not know the facts until the end of the **Sullivan** trial, it was then aware of its "proof of fraud" 161 days in advance of removal.

The Times' exercise in fantasy can be explained. There is no mystery about the passage of 335 days. There is nothing enigmatic about the conflict between the Times' sworn answers to interrogatories, under its stipulation of January 31, 1961, that it had authority to put the resident defendants' names on the advertisement,[4] and its sworn statement in its removal petition of April 13, 1961, that it did not.

The removal petition admits liability of the Times for a serious tort against the resident defendants. Caution nec-

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[4] "[Q.] Please attach to your answer to this interrogatory every document, writing, or authorization from any of the signers of the advertisement authorizing The New York Times to publish their names in said advertisement.

"[A.] The thermafax copy of the authorization for the use of the names attached to said advertisement is attached hereto and likewise the original of such was not kept by this defendant. Exhibits 'A' and 'B' respectively, attached hereto." (*Sullivan* transcript, pp. 1705-1706, stipulated as applying in *Parks*, R. 97 and 30).

essarily dictated that such an admission should await the passage of the Alabama statute of limitations of one year.

Since the Times' entire theory of fraudulent joinder has been exploded by the decision of the Supreme Court of Alabama on the Times' "proof"—the **Sullivan** transcript—this statement of the case could stop here. For surely Parks and Patterson can be guilty of no fraud in joining as defendants state residents whose liability under state law has been affirmed by that state's highest appellate court. It is inconceivable that even the District Court would have failed to remand had the **Sullivan** decision (144 So. 2d 25) been extant at the time.[8]

With apologies for the unnecessary, but to correct the Times' statement of "all the evidence" (p. 7), respondents will recite the relevant facts. It is noteworthy at the threshold that even at the hearing in the District Court, the Times' attorney-witness, when asked whether the Times' advertisement was truthful when it included the names of the resident defendants among warm endorsers, answered: "'I don't know" (R. 65). This testimony scarcely accords with the picture which the Times seeks to draw here of an uncontroverted and undisputed record showing no connection between the resident defendants and the publication of the advertisement.

The proof will show that the names of the resident defendants were on the advertisement. They did not reply to respondent's demand for retraction, and their silence in the face of the demand's inculpatory charges that each had published the libel, under circumstances normally

[7] Title 7, § 26, Alabama Code of 1940. The advertisement was published on March 29, 1960.

[8] Indeed, the District Judge at the conclusion of the hearing announced his opinion at that time that *Parks* and *Patterson* should be returned to state court. (R. 95.)

calling for a reply, is evidence from which a jury can find that they had published the material in the ad. Their failure to deny publication—not their failure to retract—is the basis of the admission.[7]

Moreover, resident defendants' silence, and their failure in any manner to disavow the advertisement, constituted a ratification.

In addition, a letter from A. Philip Randolph (**Sullivan** transcript, p. 1706) went to the jury without objection from the defendants as part of the Times' answer to an interrogatory asking for authorization from the signers of the advertisement.[8]

A witness for the Times, Aaronson, testified without objection from resident defendants that the Randolph letter was a "written communication confirming the fact that the persons whose names were given here had authorized it" (**Sullivan** transcript, p. 1864) and that such a letter was "our usual authorization." (**Sullivan** transcript, p. 1865). Murray, the author of the ad, a witness for petitioners, testified that the executive director of the committee which inserted the ad, one Bayard Rustin, had stated that the southern ministers, including the resident defendants, did not have to be contacted or consulted since they were all members of the Southern Christian Leadership Conference, and supported the work of the committee. (**Sullivan** transcript, p. 1937).

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[7] The Times asks what the resident defendants could have done "to avoid the liability which the Court of Appeals has held may reasonably be imposed?" (Petition, p. 15). They could have done what they did at the trial—deny publication in an answer to the letter charging publication. Then their pre-trial conduct would have accorded with their trial testimony. And if they had wanted a forum as wide as that of the advertisement, they could have written, most inexpensively, a letter to the *New York Times* for publication and there explained their alleged innocence.

[8] See Footnote 4, *supra*.

The sworn complaint in **Abernathy v. Patterson**, 295 F. 2d 452 (5th Cir.), cert. denied 368 U. S. 986, was introduced without objection below (R. 47-49). It strongly underlines the correctness of the jury verdicts in **Sullivan** and **James**, and conflicts sharply with the King deposition.

In short, the Times asks this Court to find as a matter of Alabama law that the Supreme Court of Alabama and the Federal Court of Appeals for Alabama are wrong on

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a. The path-taking analysis of the Court of Appeals in that case revealed:

a. "(The complaint) alleges that on or about March 29, 1960, 'supporters of the plaintiffs and the movement for equality which they lead' inserted in The New York Times a paid advertisement . . ." (295 F. 2d at 453).

b. The advertisement "purports to be signed by twenty ministers including the four plaintiffs" (295 F. 2d at 454).

c. "The complaint then alleges 'The defendants . . . conspired and planned . . . to deter and prohibit the plaintiffs and their supporters as set forth above, from utilizing their constitutional rights and in particular their right to access to a free press, by instituting fraudulent actions in libel against the plaintiffs . . .'" (295 F. 2d at 454).

d. "Irreparable damage is alleged as follows: '. . . (b) . . . the plaintiffs herein, . . . will be deterred from using the media of a free press and all other rights guaranteed under the 1st Amendment . . .'" (295 F. 2d at 454).

e. "The relief prayed for is as follows: '. . . (b) . . . Restraining each of the defendants . . . from engaging in the aforesaid conspiracy designed to deter and prohibit the plaintiffs from exercising rights guaranteed by the 1st and 14th Amendments with respect to freedom of speech, press . . .'" (295 F. 2d at 455).

f. "As has been noted (on page 454), the plaintiffs' claim of irreparable injury and loss is based (1) upon the claim that 'the plaintiffs and the Negro citizens of the State of Alabama will be deterred from using the media of a free press . . .'" (295 F. 2d at 456).

g. "Libelous utterances or publications are not within the area of constitutionally protected speech and press. The plaintiffs' claim that they will be deterred from using the media of a free press must therefore be predicated upon their claims of denial of a fair and impartial trial of the libel actions and the absence of a plain, adequate and complete remedy at law" (295 F. 2d at 456-457).

The complaint appears in full at R. 49-64.

Alabama law; that by following their decisions on Alabama law and joining these resident defendants in Alabama libel actions, respondents are guilty of fraud; that two state juries are wrong on the facts; that the **New York Times** advertisement was not truthful when it connected these resident defendants with the advertisement as "endorsers," despite the unwillingness of a Times attorney to say so more than a year thereafter (R. 65); and that the Times on three occasions inaccurately stated in sworn answers to interrogatories that it had the authority to put the names of the resident defendants in the advertisement as endorsers.[10]

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[10] The District Judge who sat with the Court of Appeals below dissented on the basis of Rule 52 (a) of the Federal Rules of Civil Procedure. The short answer is: (a) the rule gives a presumption of correctness to findings of fact, not conclusions of law; (b) the presumption does not obtain where, as here, a District Court has based its findings on documentary evidence (*United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395-396); (c) the Rule applies to actions "*tried* upon the facts without a jury" (emphasis supplied) and not to memorandum findings in the course of ruling on a motion to remand (see 5 *Moore's Federal Practice*, § 52.08, pp. 2670-2674); and (d) at all events the District Court's action was "clearly erroneous" as squarely in conflict with Alabama law as applied to the same facts, even without the corroborative evidence. *New York Times v. Sullivan*, 144 So. 2d 25.

ARGUMENT

1. The petition asks this Court to take this case in order to enter an interlocutory order that a common law libel suit, commenced in a state court against a foreign corporation and four resident defendants, should be tried instead in a Federal District Court. The basis asserted in a removal petition filed 335 days late is that the joinder is fraudulent because there is no reasonable basis for liability of the resident defendants under state law. But the highest state court, and the Federal Court of Appeals embracing that state, have held that there is such liability under state law. Surely this petition is unique in the annals of this Court, and petitioner has cited no precedent for its request.

Without approving the District Court's holding on timeliness, the Court of Appeals below applied this Court's well established test of whether respondents had a "real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied." **Chicago, R. I and P. R. Co. v. Schwyhart**, 227 U. S. 184, 194. Moreover, as Justice Holmes wrote for the Court in **Schwyhart**, the existence of a cause of action against the resident defendants was "a question of state law" (227 U. S. 184, 193-194). There this Court found a cause of action was "established" by a state verdict and judgment against the resident defendants. In the case at bar, the highest state court has approved and upheld the verdict and judgment. **New York Times v. Sullivan** (Ala.), 144 So. 2d 25.[11]

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[11] Other cases in accord with the *Schwyhart* test of good faith are: *Mecom v. Fitzsimmons Drilling Co.* 284 U. S. 183, 189-190; *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 315-319; *Chicago, R. I. and P. R. Co. v. Whitcaker*, 230 U. S. 421, 424; *McAllister*

To reach the result desired by the Times, this Court would have to hold that respondents are guilty of fraud in joining the resident defendants in the state court because the Supreme Court of Alabama and the Court of Appeals are wrong about applicable Alabama law. Such a holding would surely make a shambles of the entire federal system. And it would constitute a startling departure from this Court's admonition to the Federal judiciary in **Shamrock Oil & Gas Corp. v. Sheets**, 313 U. S. 100, 108-109:

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

The Times cannot escape the effect of the **Sullivan** decision by arguing that the Alabama Supreme Court did not consider the correctness of the trial court's charge regarding the resident defendants, and the sufficiency of the evidence against them. As pointed out previously, the Supreme Court of Alabama expressly approved the entire charge; commented upon the evidence against the resident

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C. and O. R. Co., 243 U. S. 302, 311. See also, *Moore's Commentary on the U. S. Judicial Code*, Sec. 0.03 (3.5), p. 230.

defendants; and affirmed in the face of an assignment of error urging that a verdict should have been directed in their favor.

The foregoing disposes of the only issue involved in this case—whether respondents are to be deprived of their right to choose a state forum to try a common law libel suit. Respondents have joined state defendants on facts and law which the highest state court has held to show their liability. The Times thus seeks a manifestly unauthorized interference by federal courts in the adjudication of state courts and juries concerning matters of state law. The Times has no constitutional right to a federal trial in a diversity case. **Kline v. Burke Construction Co.**, 260 U. S. 226, 233. And it is equally elemental that state courts—not a federal court in a diversity case—have the last word on the meaning and application of state law. **Erie R. Co. v. Tompkins**, 304 U. S. 64.

The Times attempts by means of removal what the resident defendants unsuccessfully sought by independent injunction in **Abernathy v. Patterson**, 295 F. 2d 452, cert. denied 368 U. S. 986, namely, a collateral revision and arrest of state court trials on assertions of fraudulent joinder of the resident defendants. The Times is even more abortive.

That such a collateral review is the Times' real aim is clear from its "Question Presented" (p. 2) which challenges the correctness and constitutionality of Alabama decisional law rather than respondents' good faith in joining resident defendants in state court.

These resident defendants have attempted to bring the **Sullivan** record to this Court for review. **Abernathy et al. v. Sullivan**, No. 609. The respondent in that case has shown that there is no federal question for review and that the state decision involves a plain issue of state law.

in the process, that respondent (Brief in opposition, pp. 14-18) has reviewed the authorities which support the holding of the Supreme Court of Alabama and the Court of Appeals below. Moreover, as the record at bar and decision of the Court of Appeals reveal, these respondents will have the additional evidence of the complaint in **Abernathy v. Patterson**, 295 F. 2d 452 (R. 109-164).

Petitioner chose to base its claim of fraudulent joinder on the **Sullivan** record. Fraud was involved, the Times argued, because that record showed the resident defendants were not liable under Alabama law. Subsequently, the Alabama Supreme Court held that this record did show liability under Alabama law. And the Court of Appeals below—after an independent determination—held that there was a substantial question of liability which could go either way.

The attempt of the Times, with no constitutional right to a federal diversity trial, to draw a federal question from the circumstances of this case is as preposterous as it is unique. There is no federal question for this Court to review.[12]

2. The Court of Appeals had an additional and independent reason for remanding this case to the state courts.

[12] The final argument of the Times that the *Sullivan* decision deprives the resident defendants of certain supposed constitutional rights has no place in this proceeding. The Times may not assert a fancied infringement of the constitutional rights of others in a different case as a reason for review of the decision of the Court of Appeals at bar to remand *this* case to a state court. *Poe v. Ullman*, 367 U. S. 497, 503, holds that constitutional questions are decided within the framework of an adjudicatory process "exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."

Moreover, the absurdity of the underlying constitutional argument—entirely hypothetical in this proceeding—is fully demonstrated in the brief in opposition in No. 609.

The Times has patently violated the time provisions of 28 U. S. C., § 1446 (b) by bringing its petition for removal 335 days late. While it did not pass on the matter, the Court of Appeals below expressly refused to approve the holding of the District Court that this time limitation did not apply to fraudulent joinder cases. And the Court of Appeals plainly foretold its holding (See extensive footnote 3 at 308 F. 2d 474, 481).

The District Court could cite no precedent for its holding that the statutory time for removal did not apply to cases where the removing defendant urged fraudulent joinder. And even if the most extreme latitude were given to the Times, even if it could justifiably refuse to rely on information in its own files or otherwise readily available to it in its search for a statutory "order or other paper from which it may first be ascertained that the case is one which is or has become removable,"[13] the Times, aware of a deposition proceeding and two trials in companion cases, was unable to come within twenty days of any such event.

The cases cited by the District Court do not support the striking proviso which it sought to engraft on § 1446 (b). They involve a plaintiff's voluntary discontinuance of the resident defendant;[14] amendment of the initial pleading to raise the amount in controversy to the federal jurisdictional amount;[15] amendment of the initial pleading or filing of additional pleading to reveal for the first time a separable controversy under the law then existing;[16] a

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[13] 28 U. S. C., § 1446 (b).

[14] *Powers v. C. & O. R. Co.*, 169 U. S. 92.

[15] *Remington v. Central Pacific*, 198 U. S. 95; *Northern Pacific R. Co. v. Austin*, 135 U. S. 315 (removal not allowed even so).

[16] *Fritzlen v. Boatmen's Bank*, 212 U. S. 364.

voluntary severance of a fictitious defendant when plaintiff announced ready for trial.[17]

The rationale of these cases is that if the rule were otherwise, a plaintiff could change an unremovable case after the time for removal had expired and still remain in state court.[18]

These circumstances are clearly not involved at bar. These cases have had the same parties, issues, facts and amounts in controversy from their inception almost a year before removal.

Objection for untimeliness was made immediately in the District Court. Accordingly, that Court improvidently cited cases which hold that objections to removal made for the first time in the Supreme Court of the United States are too late;[19] and that an imperfect removal was attributable to the plaintiff's withholding service of summons on the resident defendant.[20]

The District Court's citation of **Weeks v. Fidelity & Casualty Co.**, 218 F. 2d 503 (5th Cir. 1955), is misplaced, though the case did remand for late filing. If Parks and

[17] *Fidelity & Casualty Co. v. Safeway Steel Co.*, 191 F. Supp. 220 (N. D. Ala. 1961).

[18] A discussion of this principle can be the only conceivable relevance of *Great Northern R. Co. v. Alexander*, 246 U. S. 276, cited by the District Court. *A. G. S. R. Co. v. Thompson*, 200 U. S. 206, is devoted entirely to a question of separable controversies under the old statute and has no relation whatever to the proposition for which the District Court cited it.

[19] *Martin v. B. & O. R. Co.*, 151 U. S. 673.

[20] *Wright v. Missouri Pac. R. Co.*, 98 F. 2d 34 (8th Cir. 1938). The issue in this case was not one of timeliness, but whether resident defendant had joined in the petition for removal. The court held that plaintiff could not object to the failure of the resident defendant to join in the petition when he had not served the resident defendant.

Patterson had not objected, then the **Weeks** dictum that timeliness may be waived by failure to object would be relevant.

Just as misplaced as its reliance on **Weeks** is the District Court's citation of holdings that the removing party himself may not object later for timeliness;[21] that removal may not be effected even after an amendment raising the amount in controversy, when there was no timely petition for removal after that change;[22] that there could be no removal even after the state court had sustained a demurrer to the evidence by a resident defendant and directed a verdict for him;[23] and that where a case, brought in a state court against several defendants, including a non-resident, was dismissed as to all defendants, a reversal as to the non-residents on state appeal permitted this defendant, who had already filed a petition for removal to remove by subsequent petition.[24]

Accordingly, the District Court has cited no case supporting its holding that the statutory time for removal does not apply to cases where a removal defendant urges fraudulent joinder. Clearly, this striking departure from the Congressional prescription of a uniform, short and mandatory period of time for removal of cases from state to federal courts would have been reason enough for reversal of the District Court and remandment to the state courts.

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[21] *Ayers v. Watson*, 113 U. S. 594.

[22] *Northern Pacific R. R. v. Austin*, 135 U. S. 315.

[23] *Kansas City, etc. R. Co. v. Herman*, 187 U. S. 63.

[24] *Vilas v. Rose*, 90 U. S. 530. Cf. *Whitcomb v. Smithson*, 175 U. S. 635.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Certificate.

I, M. Roland Nachman, Jr., of counsel for Respondent Parks, and a member of the bar of this Court, certify that I have mailed by air mail, postage prepaid, a copy of the foregoing Brief in Opposition to Messrs. Lord, Day & Lord, 25 Broadway, New York, New York, counsel for The New York Times Company, Petitioner.

This ..... day of January, 1963.

.....

M. R. Nachman, Jr.,
Of Counsel for Respondent Parks.

APPENDIX A

Undisputed Chronology of Events in Alabama Courts

(R. 30 and 40 and R. 96-98.)

April 19, 1960	Parks complaint filed.
April 21, 1960	Service on McKee and on the Secretary of State of Alabama.
April 23, 1960	Summons and complaint received by The New York Times as evidenced by return receipt card.
May 20, 1960	Motion to quash service of process filed by The New York Times in Alabama Court.
June 3, 1960	Depositions of Claude Sitton and Thomas M. Hurley taken in Atlanta, Georgia.
June 25, 1960	Depositions of resident defendants, Abernathy, Seay and Lowery taken in Montgomery, Alabama. These defendants disclaimed authorization for use of their names in the advertisement. Attorney for The Times present at this proceeding. (See R. 41-42.)
August 5, 1960	Motion to quash Sullivan service denied after evidence taken in open court before trial judge.
November 3, 1960	Judgment in Sullivan case rendered against all defendants.
November 21, 1960	Stipulation between attorneys for plaintiff and for The New York Times with

	reference to the transcript of record in Parks v. The New York Times Co. et al., to be filed in the Supreme Court of Alabama. (See R. 104-107.)
December 9, 1960	Stipulation approved by Supreme Court of Alabama. (See R. 108-109.)
December 16, 1960	Amendment to motion to quash service filed by Times in Parks case.
December 16, 1960	Hearing on motion and amended motion of Times to quash service in Parks case.
December 16, 1960	Order of Circuit Court of Montgomery County, Alabama, denying motion to quash and amended motion to quash service of The New York Times in Parks case.
January 31, 1961	Interrogatories served on New York Times, and stipulation between counsel for plaintiff and defendant New York Times that answers in Parks case could be the same as in Sullivan v. The New York Times et al.
February 1, 1961	James case judgment rendered against all defendants.
February 10, 1961	Motion filed by New York Times asking notice of time and place of selecting jury venire for the Parks case. Motion granted on same date.
March 3, 1961	Special drawing of the jury venire of the Circuit Court of Montgomery County, Alabama, for cases to be tried during the week of May 1, 1961, pursuant to the request and in the pres-

	ence of counsel for New York Times. Announcement at this time by Presiding Judge Jone that Parks v. The New York Times Company et al. would be set for trial on merits on May 1, 1961.
April 13, 1961	Petition for removal (R. 3-17) to the United States District Court filed.
April 13, 1961	Parks' motion to remand filed (R. 17-21).
April 20, 1961	Patterson's motion to remand filed (R. 219-224).

APPENDIX B.

28 U. S. C., Section 1446:

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Title 7, Section 26, Alabama Code of 1940:

"Limitation of One Year—The following must be commenced within one year:

* * *. Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated (1935, p. 780).

Rule 52, Federal Rules of Civil Procedure:

Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the

court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

Amendment 7 of the Constitution of the United States:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.